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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Shasta)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

KELLY LEE BOHANNAN,

Defendant and Appellant.

C068482

(Super. Ct. Nos. 10F2176,  
10F2330, 11F2362)

Defendant Kelly Lee Bohannan appeals from the imposition of two sentence enhancements, a prior strike conviction and an on-bail enhancement. He contends (1) there is not sufficient evidence to support the true finding as to his prior strike conviction and (2) the on-bail enhancement must be stricken, as he did not admit it.

As to the first contention, we requested supplemental briefing as follows: After defendant withdrew his admission of the prior strike conviction to contest the validity of the strike, and the trial court's subsequent determination that the prior conviction was a

valid strike, was the court required to comply with Penal Code section 1025<sup>1</sup> and have defendant personally answer that he had suffered the prior conviction before imposing the originally negotiated disposition? We find in the absence of a proper true finding on the prior strike conviction, the trial court was required to comply with section 1025 and obtain defendant's personal admission.

The People properly concede the second contention. Accordingly, we shall reverse and remand for further proceedings on the enhancement allegations.

### **FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

In case No. 10F2176 defendant was charged in March 2010 with possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) It was further alleged he had a prior strike conviction in 1987 (Pen. Code, § 1170.12) and had served five prior prison terms (*id.*, § 667.5, subd. (b)).

A few days later, defendant was charged in a separate complaint—case No. 10F2330— with felony vandalism (Pen. Code, § 594, subd. (b)(1)), attempted auto theft (Veh. Code, § 10851, subd. (a)/Pen. Code, § 664), and misdemeanor counts of driving under the influence (Veh. Code, § 23152, subd. (a)), being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)), hit-and-run (Veh. Code, § 20002, subd. (a)) and obstructing a peace officer (Pen. Code, § 148, subd. (a)(1)). As to the felony charges, it was also alleged defendant had committed these offenses while he was released on bail in case No. 10F2176. It was further alleged defendant suffered a prior strike conviction (Pen. Code, § 1170.12) and had served five prior prison terms (*id.*, § 667.5, subd. (b)).

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

<sup>2</sup> Because of the nature of the claims on appeal, a detailed recitation of the substantive factual and procedural history of the current offense is not necessary.

In July 2010, in case No. 10F2176, defendant pleaded no contest to possessing methamphetamine and admitted the prior strike allegation. In case No. 10F2330, he pleaded no contest to felony vandalism, felony attempted vehicle theft and misdemeanor driving under the influence. He also admitted the prior strike conviction and five prior prison term allegations. The plea agreement indicated defendant would also admit the on-bail enhancement allegation. However, defendant did not actually enter that admission. Pursuant to the plea agreement, the remaining charges were dismissed. Defendant was provisionally granted probation if he completed the Teen Challenge treatment program. If he failed the program, he would be sentenced to a term of 15 years four months in state prison.

Approximately three weeks later, defendant moved to withdraw his admission of the prior strike, based on his claim that the 1987 conviction was a misdemeanor conviction, not a felony. The People acknowledged defendant had established a sufficient basis for withdrawing the admission and the trial court granted the motion.

At the hearing on the motion, the People noted defendant was now entitled to a jury trial on the strike allegation and indicated their willingness to proceed immediately to a court trial if defendant waived his right to a jury trial. Defense counsel and defendant indicated they were prepared to waive jury trial and proceed to a court trial. The court and counsel then set forth the issues to be addressed: first, the validity of the underlying felony conviction; second, whether the prior strike allegation was true; and, third, Was ineffective assistance of counsel rendered in the 1987 proceedings?<sup>3</sup>

The People offered into evidence the 1987 change of plea form and copy of the information. The trial court took judicial notice of the entire 1987 file (case

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<sup>3</sup> The issue of ineffective assistance of counsel was resolved in a separate writ of habeas corpus proceeding.

No. 87-1772), including the copy of the plea form, the information and preliminary hearing transcript. The 1987 file reveals that defendant was charged with, among other things, felony dissuading a witness. (§ 136.1, subd. (c).)<sup>4</sup> Following the preliminary hearing, defendant was held to answer for a “violation of [section] 136.1, a misdemeanor, of attempting to persuade a witness.” Six weeks after the preliminary hearing, defendant pleaded guilty to two drug possession counts and “preventing and dissuading a witness from testifying, a felony, in violation of Section 136.1[, subdivision] (c) of the California Penal Code, as charged in count 3 of the Information on file. . . .” (Some capitalization omitted.) In accepting the plea, the court found a factual basis for the felony plea. The record of judgment and sentencing and the report of sentence both indicate defendant was found guilty of a felony count of dissuading a witness. There was no reporter’s transcript of the plea hearing in the court file.<sup>5</sup>

At the conclusion of the September 2010 hearing, the court (an assigned judge) took the matter under submission commenting, “This seems to be [a] complicated issue.” After various continuances, and some confusion as to the current status of the case, in April 2011, the People explained the procedural posture of the case to the court: That defendant had been allowed to withdraw his strike admission and there had been “a trial on the priors in which the People presented the certified copy of conviction, requested judicial notice of the court’s file concerning that, defense counsel presented evidence during the trial that consisted of the preliminary hearing from the—in the underlying strike prior, [and] both parties argued.” The People advised the court the parties were

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<sup>4</sup> At the time, section 136.1, subdivision (c) was a straight felony; subdivisions (a) and (b) were misdemeanors. Currently, section 136.1 is a wobbler offense.

<sup>5</sup> Although the 1987 court file was not included in the record on appeal, this court took judicial notice of the 1987 case, *People v. Bohannan* (Super. Ct. Shasta County, 1987, No. SCRDCRF87-0001772-002), on our own motion. (Evid. Code, §§ 459, subd. (a), 452, subd. (d).)

waiting for a ruling as to whether the strike prior had been proven: “We submitted the documents, requested judicial notice and had the court trial, but the Court never made any findings as to whether or not the People have met their burden of proof with respect to the strike allegation. . . . [W]e were on I believe . . . for the Court to issue the findings on whether or not the People had proven the strike allegation.” The People also clarified that defendant’s motion was not a motion to strike the prior, because the argument was not “that the punishment should be stricken, but that the strike itself was not a valid strike.”

After reviewing the 1987 court records, the assigned trial judge ruled, “I don’t see anything invalid about the strike, because it was charged as a felony, he pled to a felony. The change of plea form clearly indicates that, so I don’t see anything invalid about the strike itself. . . . But if it’s simply here to determine the validity, and I’m—of the strike itself, it—the ruling of the Court is that it is valid.”

Meanwhile, between the time of the original plea agreement in case Nos. 10F2176 and 10F2330 (July 2010) and the trial on the prior strike allegation (April 2011), another complaint alleging additional drug possession charges was filed against defendant in case No. 11F2362. After the court’s finding that the 1987 conviction was a valid strike, the parties entered into a global disposition of all three cases. Under this disposition, in addition to his earlier pleas, defendant also pleaded guilty to transporting methamphetamine in case No. 11F2362. In exchange, he was to be sentenced to the previously agreed upon term of 15 years four months on case Nos. 10F2176 and 10F2330, and an additional consecutive one year on case No. 11F2362.<sup>6</sup>

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<sup>6</sup> At sentencing the actual terms added up to a total of 16 years. Both parties agreed to this as an acceptable term.

## DISCUSSION

### I. Prior Strike Conviction

Defendant contends there is not sufficient evidence to support the true finding that he had a prior strike conviction. He contends because the prosecution did not proffer evidence admissible under *Shepard v. United States* (2005) 544 U.S. 13 [161 L.Ed.2d 205] (*Shepard*), the prior strike conviction was not proven. He also argues even if the 1987 records considered by the trial court constituted a record of conviction, they were insufficient to establish that defendant pleaded to a felony. Lastly, he argues there was no record of conviction created and no finding of identity made by the court. We find the records offered to establish the prior conviction were admissible and constituted sufficient evidence that the 1987 offense was a felony. We agree with defendant that there was a fatal flaw in the proceedings below; however, we disagree as to the nature of the flaw. While defendant reads the error as a problem with the sufficiency of the evidence, from our review of the record the error came in the taking of the second plea, the global disposition of all three cases and the prior strike. The parties agreed the sentence would be the originally negotiated disposition of 15 years four months plus an additional consecutive one-year term for the third case. This sentence expressly included the prior strike admission, which had been withdrawn. However, defendant did not enter a new admission to the prior strike and the court did not make a finding that defendant had actually sustained a prior strike conviction. Accordingly, we must remand the matter to the trial court.

#### A. *Admissibility and Sufficiency of Evidence of Prior Strike*

Defendant relies on *Shepard* to support his claim that the prior strike was not proven to be a felony conviction rather than a misdemeanor because the prosecution offered documents beyond those allowed under *Shepard*. In *Shepard*, the United States Supreme Court held that the determination under the Armed Career Criminals Act (ACCA) of “whether a plea of guilty to burglary defined by a nongeneric statute

necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” (*Shepard, supra*, 544 U.S. at p. 26 [161 L.Ed.2d at p. 218].) Defendant contends the materials relied upon in this case by the prosecution to prove the prior conviction did not meet this standard. Defendant also argues that *People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*), which allows consideration of the entire record of conviction, is erroneous under *Shepard*. He contends the documents which can now be considered are much more limited and “include only documents from the prior case that show that the plea of guilty itself ‘ “necessarily” rested’ on a fact that identifies the crime as one falling within the statute.” (Quoting *Shepard, supra*, 544 U.S. at pp. 20-21 [161 L.Ed.2d at p. 214].)

Initially, the court’s plurality conclusion in *Shepard*, limiting the evidence to be considered, was based on the interpretation of a federal statute, the ACCA, fundamentally distinct from California law. That federal statute did not have the procedural protections for defendants that California law does; it did not afford the defendant a jury trial or findings beyond a reasonable doubt on the prior convictions. Thus, the *Shepard* court’s concern that permitting a sentencing court to use a wide array of evidence to establish a qualifying prior conviction would infringe upon a defendant’s right to a jury trial is not applicable here. (*Shepard, supra*, 544 U.S. at p. 24-26 [161 L.Ed.2d at pp. 216-217]; see also *People v. Gonzales* (2005) 131 Cal.App.4th 767, 775.)

Moreover, we disagree with defendant that *Guerrero, supra*, 44 Cal.3d 343 is no longer good law. The argument ignores the express language of *Shepard* which states that among the records which may be considered, *in addition* to “the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed” is “some comparable judicial record

of this information.” (*Shepard, supra*, 544 U.S. at p. 26 [161 L.Ed.2d at p. 218].) This is not inconsistent with the current standard in California, that “[i]n determining the substance of a prior conviction, the trier of fact may look to the entire record of conviction. [Citation.] The ‘record of conviction’ includes the charging document and court records reflecting defendant’s admission, no contest plea, or guilty plea.” (*People v. Gonzales, supra*, 131 Cal.App.4th at p. 773.) The record of conviction also includes transcripts of the preliminary hearing and the sentencing hearing. (*Ibid.*; *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1101.)

Here, the trial court took judicial notice of the entire 1987 court file. This file included the charging documents, defendant’s change of plea declaration, the change of plea minutes, the probation report, disposition of arrest and court action, the preliminary hearing transcript, the judgment and sentencing order, and the report of sentence. These are judicial records containing information comparable to that required in *Shepard*. The records demonstrate unambiguously that defendant was charged with, and pleaded guilty to, a felony violation of section 136.1, subdivision (c). The court found a factual basis for that plea, accepted the plea and found defendant guilty of a felony violation of section 136.1, subdivision (c). Each of these documents not only specifically states the offense is a felony, but also specifies the violation is of subdivision (c), the subdivision which described a felony offense. This is sufficient evidence to establish that defendant’s prior conviction was a felony offense, not a misdemeanor.

Defendant also contends the documents in the 1987 court file, of which the trial court took judicial notice, are not substantial evidence of a felony conviction. “Evidence Code sections 452 and 453 permit the trial court to ‘take judicial notice of the *existence* of judicial opinions and court documents, *along with the truth of the results reached—in the documents such as orders, statements of decision, and judgments*—but cannot take judicial notice of the truth of hearsay statements in decisions or court files, including

pleadings, affidavits, testimony, or statements of fact.’ ” (*People v. Harbolt* (1997) 61 Cal.App.4th 123, 126-127, second italics added.) This is so because “another court’s findings of fact and conclusions of law in support of a judgment . . . are conclusive and uncontrovertible in character and not reasonably subject to dispute.” (*People v. Tolbert* (1986) 176 Cal.App.3d 685, 690.) Here, the no contest plea recorded in the court minutes and the judgment the court pronounced based on that plea are just as “conclusive and uncontrovertible” as any findings of fact and conclusions of law. Accordingly, the court minutes were sufficient to prove that the prior conviction was for a felony offense of dissuading a witness.

***B. Necessity of Admission to, or True Finding on, Prior Strike Conviction***

Under sections 1025 and 1158, the judge or jury must find whether the defendant has suffered the prior conviction or the defendant must personally admit it. We requested supplemental briefing from the parties on whether the trial court was required to take an admission to the prior strike conviction pursuant to section 1025. In their response to our request for supplemental briefing, the People claim the withdrawal of defendant’s strike admission was conditional and solely for the purpose of challenging the validity of the strike as a felony conviction, and that his admission that he was the person who committed the offense was “implicitly stipulated to remain.” Defendant, on the other hand, contends a trial on the prior conviction never occurred. Based on our examination of the record, we cannot agree with either of these readings of the record.

Upon the withdrawal of defendant’s admission, the parties agreed to proceed to a court trial on the prior strike conviction and set forth the issues to be decided as: (1) the validity of the underlying felony conviction; (2) whether the prior strike allegation was true; and (3) was ineffective assistance of counsel rendered in the 1987 proceedings. When explaining the status of the case several months later, the People expressly noted the parties were waiting for the court to make findings on whether the People had met

their burden of proof on proving the strike allegation. Given that the truth of the prior strike was expressly delineated as an issue to be determined, we cannot agree with the People's claim that there was an implicit limitation of defendant's withdrawal of his admission.

Nor does defendant's claim that there was no trial on the prior conviction find support in the record. The parties agreed to a court trial on the prior strike and agreed on the issues to be decided. On September 10, 2010, they each presented evidence from the 1987 court records, and argued extensively about the validity of the prior strike conviction. After consideration of those records, the court ruled the strike was a valid felony conviction.

While the court plainly found the dissuading a witness conviction qualified as a serious felony, that was only part of what the court was called upon to decide. At a trial on the proof of alleged prior felony convictions, the prosecution has the burden to prove both that the offense committed qualifies as a serious felony in California *and* that the defendant is the person described in the records of the prior conviction. (§ 1025, subds. (b) & (c); *People v. Epps* (2001) 25 Cal.4th 19, 23, 25; *People v. Walker* (2001) 89 Cal.App.4th 380, 386.) The court made the first finding, but not the second. Instead, once the court found that the alleged strike qualified as a prior serious felony conviction, the parties agreed to a global disposition of the two original cases (case Nos. 10F2176 and 10F2330) and the more recent third case (No. 11F2362). The disposition included sentencing on the prior serious felony conviction allegation. To proceed to such a disposition in the absence of a true finding by the court that defendant was the person described in the 1987 records of the prior conviction allegations, defendant had to again admit the prior strike conviction. A defendant must personally enter his plea in open court. (§ 1018; *People v. Hofferber* (1977) 70 Cal.App.3d 265, 268.) To find that a defendant has admitted a strike, the trial court must specifically ask the defendant

whether he admits the prior conviction and record the response in the minutes. (§ 1025, subd. (a).) This was not done.

In the absence of a proper factual finding regarding the prior conviction, or a personal admission of the prior conviction, we must vacate the prior strike conviction and remand the matter to the trial court for proper findings. (See *People v. Walker, supra*, 89 Cal.App.4th at pp. 386-387.) The issue of verifying defendant's identity is to be tried to the court without a jury. (§ 1025, subd. (c).) Accordingly, we will remand the matter for defendant personally to admit the prior serious felony conviction allegation, or submit to a court trial on the issue of identity—whether he is the person who has suffered the prior conviction.

We note on the issue of identity, “[i]t has long also been the rule in California, in the absence of countervailing evidence, that *identity of person may be presumed, or inferred, from identity of name.*” (*People v. Mendoza* (1986) 183 Cal.App.3d 390, 401; accord, *People v. Mason* (1969) 269 Cal.App.2d 311, 314 (*Mason*) [“California cases hold that, in the absence of other and contrary testimony, [fn. omitted] the identity of names, coupled with proper proof of prior convictions, is sufficient to sustain a finding that defendant was the person involved in the earlier cases.”].) No countervailing evidence was presented in this case. That said, we remand the case to the trial court to make the appropriate findings on the prior conviction allegation or take defendant's admission, because it is not the role of this court to make factual findings. After the court properly determines the question of the truth of the prior conviction it will again have to address its sentencing options. (*People v. Walker, supra*, 89 Cal.App.4th at p. 387.)

## **II. On-bail Enhancement**

Defendant next contends the trial court failed to elicit an admission to the two-year on-bail enhancement. The People properly concede this error. Because the trial court failed to obtain an adequate admission, the enhancement was not proven, the finding that

defendant admitted the allegation cannot stand and the enhanced term cannot be imposed. (*People v. Bryant* (1992) 10 Cal.App.4th 1584, 1595.) As for the appropriate disposition, what is required when the court forgets to take an agreed upon plea to a sentence enhancing provision “ ‘is to return the proceedings to the point at which the court erred and reroute them to the proper track.’ [Citation.] Since the error consisted of the trial court’s failure to take [certain] admissions . . . , findings on those allegations should be reversed and the matter remanded for further plea proceedings as to those allegations only.” (*Id.* at p. 1598.)

### **DISPOSITION**

The judgment is affirmed as to the substantive offenses. The implicit true findings on the on-bail enhancement and prior serious felony conviction allegations, and the sentences imposed as a result of those findings are vacated. The matter is remanded for further proceedings consistent with this opinion. After sentence is imposed in accordance with this opinion, the trial court is directed to amend the abstract of judgment to reflect the new sentence and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

\_\_\_\_\_**BUTZ**\_\_\_\_\_, J.

We concur:

\_\_\_\_\_**BLEASE**\_\_\_\_\_, Acting P. J.

\_\_\_\_\_**NICHOLSON**\_\_\_\_\_, J.